

A **TETUAN PUTRA GILL v. GEE BOON KEE & ORS**
 HIGH COURT MALAYA, KUALA LUMPUR
 YEOH WEE SIAM J
 [ORIGINATING SUMMONS NO: 24NCVC-1690-11-2014]
 4 JUNE 2015

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***CIVIL PROCEDURE:** Action – Commencement – Breach of consent order – Enforcement of – Commencement of action by way of originating summons – Whether there were serious disputes on facts and law – Proper mode of commencement – Whether by way of writ action*

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***CIVIL PROCEDURE:** Judgments and orders – Enforcement – Consent order – Main suit withdrawn upon recording of consent order – Breach of consent order – Whether plaintiff entitled to enforce consent order – Whether withdrawal of main suit rendered consent order unenforceable*

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The plaintiff, a firm of advocates and solicitors, had acted for the defendants and one other person in a court action. Arising from the services, the plaintiff commenced an action against the defendants and one other person ('the suit') claiming the sum of RM2,096,678.80. However, before the commencement of the trial, the parties pursued mediation and managed to amicably resolve their disputes. The terms of the consent order were, *inter alia*, that (i) the defendants would jointly and severally pay, to the plaintiff, the aggregate sum of RM160,000 on an *ex gratia* basis with no admission to liability; and (ii) in the event that the defendants defaulted in paying the sum or any part of it, the plaintiff was entitled to be paid the whole sum of the claim less any amounts which had been paid without a requirement for a further order to be made against the defendants jointly and severally. The plaintiff alleged that, as at the due date, only the amount of RM120,000 had been received from the defendants collectively leaving a balance of RM40,000. By reason thereof, the plaintiff instituted an originating summons ('OS') and contended that the defendants had collectively breached the consent order and were

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Held (dismissing plaintiff's application):

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(1) When both parties recorded the consent order, the plaintiff made the fatal mistake of withdrawing the suit. It is imperative that when recording a consent order, the suit should be retained and not be withdrawn, to ensure the continued existence and enforceability of the consent order should any party subsequently default in compliance of the order. The suit had therefore been extinguished and there was no legal basis upon which the consent order was founded. (para 9)

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- (2) The plaintiff was only left with the consent order to be enforced under O. 45 r. 1 of the Rules of Court 2012. However, if a civil suit has been withdrawn, any judgment or order obtained under the said suit would no longer exist. Hence, as the plaintiff had chosen to withdraw the suit with no order as to costs, the plaintiff could not turn back and institute the OS to seek a declaration on the consent order which could no longer be sustained. (paras 10 & 12) A
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- (3) Both parties had agreed, in the consent order, not to obtain further order should there be a default in payment of the sum. By instituting the OS for further orders, the plaintiff had breached the consent order and did not come to the court with clean hands. The plaintiff should have instead embarked on an enforcement of proceedings of the consent order or file a fresh writ action to claim the sum. (paras 14 & 15) C
- (4) The plaintiff did not have any basis to claim any future monies from the first to the fourth defendants and the sixth defendant as they had complied with the consent order by paying their respective shares before the due date. Therefore, there was no default on the part of the first to fourth defendants and the sixth defendant. The institution of the OS against the five defendants was therefore contrary to the principles of justice. The seventh defendant had stated that she had paid the cheque to the plaintiff's solicitors and there was no evidence from the plaintiff to show otherwise. Further, the delay in payment by the fifth and eighth defendants could be treated as *de minimis* since it did not prejudice the plaintiff. (paras 18, 21 & 22) D
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- (5) The consent order was clear in its express provisions. On the face of the consent order only the sum of RM160,000 was stated. If the plaintiff wished to claim for RM2,096,678.80 or RM1,976,678.80, from the defendants, the plaintiff had to institute a fresh civil suit and not OS. Further, in the consent order, the sum of RM160,000 was to be paid by the defendants on an *ex gratia* basis, with no admission to liability. In the circumstances, the OS should not have been instituted in the first place. The proper mode of commencement was by way of writ action as there were serious disputes on facts and law on the matter. (para 24) F
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Case(s) referred to:

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 1 LNS 26 HC (*refd*)
Misliha Lagiman v. Linguaphone Distributors Sdn Bhd [2003] 1 LNS 598 HC (*refd*) H
Nagandran Kalianna Gaundar v. Melinda Alison Monteiro & Ors [2006] 4 CLJ 573 HC (*refd*)

Legislation referred to:

Rules of Court 2012, O. 45 r. 1

- A *For the plaintiff - David Mathews (Tina Francis & Malarvily Perumal with him);
M/s Mathews Hun Lachimanan*
*For the 1st, 2nd, 3rd, 4th & 6th defendants - Brian Cumming (Neo Chi Chyn with him);
M/s Gideon Tan Razali Zaini*
For the 5th, 7th & 8th defendants - Charanjit Singh Saini; M/s CS Saini & Assocs
- B *Reported by S Barathi*

JUDGMENT

Yeoh Wee Siam J:

C Background Facts

[1] The plaintiff is a firm of Advocates & Solicitors who acted for the defendants and one other person in Kuala Lumpur High Court Originating Summons No. F 31-90-86 and appeals therefrom to the Court of Appeal and subsequent proceedings in the Federal Court.

D [2] Arising from the retainer and services provided, the plaintiff subsequently commenced an action ie, Kuala Lumpur High Court Civil Suit No. 22NCVC-714-06/2012 (“the suit”) against the defendants and one other person claiming the sum of RM2,096,678.80 (being the aggregate balance sums due under five separate bills of costs all dated 16 August 2007) together with interests thereon and costs.

E [3] Shortly before the trial of the suit, the parties thereto pursued mediation at the Mediation Centre of the Kuala Lumpur Court and managed to amicably resolve their disputes. It was left to parties to work out and settle the terms of a consent order.

F [4] The terms of resolution were agreed upon by the respective solicitors for the parties and a consent order was duly recorded before the presiding judge on 18 August 2014 (“consent order”). The draft consent order was duly signed by the solicitors for the parties. The sealed consent order (exh. JS-2) was duly served on the respective solicitors for the defendants on 4 September 2014 and 5 September 2014.

[5] The material terms of the consent order are as follows:

- H a. Defendan-Defendan Pertama hingga Kelapan secara sesama dan berasingan membayar jumlah aggregat sebanyak RM160,000.00 (“**Jumlah tersebut**”) yang dikira pada kadar RM20,000 kepada Plaintiff pada atau sebelum 15.9.2014 sebagai bayaran *ex gratia* atas dasar tiada pengakuan terhadap liabiliti;
- I b. Dalam keadaan Defendan-Defendan Pertama hingga Kelapan ingkar membayar Jumlah tersebut atau mana-mana bahagian daripadanya selaras perintah ini, Plaintiff berhak dibayar keseluruhan jumlah tuntutan (kurang apa-apa jumlah yang mungkin telah dibayar) tanpa keperluan perintah selanjutnya terhadap Defendan-Defendan secara sesama dan berasingan.

- c. Tindakan ini ditarik balik tanpa perintah terhadap kos dan atas Jumlah tersebut diterima selaras perintah ini, pihak-pihak tidak mempunyai sebarang tuntutan atau aduan lain berkenaan isu-isu yang dibangkitkan dalam tindakan ini. (emphasis added). A

[6] As at the close of the plaintiff's business on 15 September 2004, only a sum of RM120,000 was received from the defendants collectively leaving an outstanding sum of RM40,000. By reason thereof, the plaintiff contended that the defendants are collectively in breach of the consent order and arising therefrom are jointly and severally liable to pay the plaintiff the sum of RM1,976,678.80. The defendants have failed to pay the said sum of RM1,976,678.80 despite the plaintiff formally demanding for it. The plaintiff then instituted this originating summons ("OS") (encl. 1) ("the application") against the eight defendants. B C

Enclosure 1

- [7] In this OS, the plaintiff applies for the following orders and reliefs: D
- (i) a declaration that by failing to pay the plaintiff the entire aggregate sum of RM160,000 ("the compromised sum") on or before 15 September 2014 ("the deadline"), the defendants are collectively in breach of the terms of the consent order dated 18 August 2014 ("the consent order") recorded in Kuala Lumpur High Court Civil Suit No. 22NCVC-714-06/2012 ("the suit"); E
 - (ii) a declaration that arising from the breach of the consent order, the defendants are jointly and severally liable to pay the plaintiff the entire value of its claim in the suit (RM2,096,678.80), less monies actually received by the plaintiff from the defendants pursuant to the consent order as at the close of business on the deadline (RM120,000); F
 - (iii) judgment be entered against the defendants jointly and severally in the sum of RM1,976,678.80 favouring the plaintiff with interest thereon at the rate of 8% per annum or at such other rate deemed just by this Honourable Court from 16 September 2014 till the date of judgment pursuant to the provisions of Civil Law Act; G
 - (iv) further that any sums adjudicated and ordered to be paid under para. 3 above carry post judgment interest at the rate of 5% per annum from the date of judgment till full satisfaction; H
 - (v) costs of this action be paid by the defendants to the plaintiff; and
 - (vi) such further and other relief deemed just and proper by this Honourable Court.

Court's Decision Given On 5 May 2015 Regarding Encl. 1 I

[8] The plaintiff's application is dismissed. Costs of RM2,000 are to be paid by the plaintiff to each of the eight defendants.

A Grounds For Decision*Suit Has Been Withdrawn*

B [9] When both parties recorded the consent order on 18 August 2014, the plaintiff made the fatal mistake of withdrawing the suit ie, Kuala Lumpur High Court Civil Suit No. 22NCVC-714-06-2012. It is imperative that when recording a consent order, the suit should be retained and not be withdrawn. This is to ensure the continued existence and enforceability of the consent order should any party subsequently default in compliance of the said order. However, in this case, the plaintiff immediately withdrew the suit upon recording the consent order. The suit has been extinguished. There is therefore no suit in existence to form the legal basis upon which the consent order is founded/premised.

C [10] The plaintiff is now left with only the consent order to enforce in the usual manner ie, under O. 45 r. 1 of the Rules of Court 2012 ("ROC").

D [11] Learned counsel for the first to fourth defendants, and the sixth defendant submitted that the plaintiff cannot enforce a consent order for a suit which no longer exists. The principle is held by LC Vohrah J in *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 1 LNS 26; [1989] 2 MLJ 425 at p. 426 as follows:

E ... that statement of fact did not reflect the true position as the civil suit in which the default judgment had been obtained no longer existed having been withdrawn at the instance of the petitioner so that the petition could not be sustained as the judgment upon which the petition was founded could not subsist independently of the civil suit from which it arose.

F [12] From the above case, it is clear that if a civil suit has been withdrawn, any judgment or order obtained under the said suit would no longer exist. It is a very similar situation in the present case as the plaintiff had chosen to withdraw the suit with no order as to costs. The plaintiff cannot now turn back and institute this OS to seek a declaration on the consent order which can no longer be sustained.

The Consent Order Excludes Any Further Order

G [13] Paragraph (b) of the consent order expressly states that in circumstances where the first to the eighth defendants default in paying the said sum or any part of it in accordance with the consent order, the plaintiff is entitled to be paid the whole sum of the claim less any amounts which may have been paid, "tanpa keperluan perintah selanjutnya terhadap defendan-defendan secara sesama dan berasingan", meaning that there is no requirement for a further order to be made against the defendants jointly and severally.

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[14] Both parties have agreed to the provisions of the above paragraph (b) of the consent order ie, not to obtain a further order should there be a default in payment of the sum. Therefore, by instituting this OS for further orders, the plaintiff is actually breaching paragraph (b) of the consent order, and not coming to this court with clean hands.

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[15] Instead of proceeding by way of this OS for the declarations sought, the plaintiff should have embarked on enforcement proceedings of the consent order (if it can succeed), or file a fresh writ action to claim the sum of RM1,976,678.80.

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[16] By instituting this OS, the plaintiff is actually abusing the process of the court.

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Where Justice Lies

[17] In *Misliha Lagiman v. Linguaphone Distributors Sdn Bhd* [2003] 1 LNS 598 at p. 9, Syed Ahmad Helmy B. Syed Ahmad JC (as he then was) held as follows:

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In *British Russian Gazette Ltd v. Associated Newspaper Ltd* [1933] 2 KB 616 at 643 Scrutton LJ stated:-

Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

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The approach of Court should take in determining whether there has been "accord and satisfaction", both in law and fact, is well settled and the best exposition of it appears in Roskill J's Judgment in *Margaronis Navigation Agency Ltd v. Henry W Peabody Co of London Ltd* [1965] 1 QB 300 at 319.

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Where the question arises whether **a particular obligation has been performed, the first thing that has to be done is to ascertain the nature of the obligation.** That depends upon the construction of the contract and the construction of the contract is, of course, a question of law. But that is only one part of the equation. Having ascertained what the obligation is, **one then has to measure the performance, and see whether the performance fulfils the obligation.** That again ultimately is either a question of law or a question of mixed facts and law; not perhaps in every case, but in a great many cases. (emphasis added).

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(See also *Nagandran Kalianna Gaundar v. Melinda Alison Monteiro & Ors* [2006] 4 CLJ 573 at pp. 581 and 582 on the defence of accord and satisfaction).

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A [18] The due date for payment of the RM160,000 to the plaintiff under the consent order is 15 September 2014 even though it is not stated as the 'deadline'. The first to fourth defendants, and the sixth defendant had complied with the consent order and paid their respective shares by five cheques totalling RM100,000 on time ie, on 12 September 2014, before the due date of 15 September 2014. There is no default on the part of the first to fourth defendants, and the sixth defendant in complying with the consent order. Thus, it is contrary to the principles of justice for the plaintiff to institute this OS against these five defendants when they have paid their share and complied with their respective obligations under the consent order. The plaintiff does not have any basis to claim any future monies from the first to fourth defendants, and the sixth defendant.

D [19] It is observed that there is no mention of the sum of RM2,096,678.80 in the consent order. Paragraph (b) thereof entitles the plaintiff to be paid the whole claim less any amounts paid should full payment not be made by all the defendants by 15 September 2014. The defendants contended that the whole claim in the consent order is RM160,000 and not the sum of RM2,096,678.80. On the face of the consent order, it is true that only the sum of RM160,000 is stated, but not the sum of RM2,096,678.80. The plaintiff has to institute a fresh civil suit and not an OS if it wishes to claim RM2,096,678.80 or RM1,976,678.80, as the case may be, from the defendants. It must be borne in mind that in the consent order, the sum of RM160,000 is to be paid by the defendants on an *ex-gratia* basis, with no admission of liability.

F [20] The consent order is clear in its express provisions. There is no necessity for this court to declare and mouth the obvious terms which have already been expressly stated in the consent order.

G [21] Learned counsel for the seventh defendant informed the court that the seventh defendant had paid the cheque to the plaintiff's solicitors on 15 September 2014. This is a statement from the Bar but there is no evidence from the plaintiff to show otherwise.

H [22] As for the remaining fifth, seventh and eighth defendants, payment of RM40,000 was made by the fifth and eighth defendants, although late by two days, given the time to clear the cheques. However, the plaintiff rejected the payment by solicitors of the fifth and eighth defendants. The late payment can be treated as *de minimis* since it does not prejudice the plaintiff. It is further noted that as on 16 October 2014, the defendants' solicitors had written to the plaintiff's solicitors to inform them that the RM40,000 had been placed in a fixed deposit interest earning account on 10 October 2014 (exhs. JS-4 and JS-5 of affidavit in reply of D5, D7 and D8 in encl. 5).

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[23] It is to be noted too that after the court had dismissed the plaintiff's application, learned counsel for the plaintiff made an oral application to the court for a consequential order that the RM40,000 that was paid by the fifth and eighth defendants be paid to the plaintiff. I allowed the oral application in accordance with the previous undertaking given by the solicitors for the fifth and eighth defendants by letter.

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Writ Action Is The Proper Mode Of Commencement

[24] Based on the foregoing considerations, this OS should not have been instituted in the first place. However, in case I had erred in my decision, even if the plaintiff wishes to pursue the matter, the proper mode of commencement is by way of a writ action, and not by an OS. This is for the reason that there are serious disputes on facts and law on the matter.

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[25] There will be several issues to be tried, in open court, such as, *inter alia*, the following:

- (i) whether the consent order can stand since the suit has been withdrawn;
- (ii) without the existence of the suit, is the plaintiff entitled to claim for RM2,096,678.80 less any amounts paid, ie, RM1,976,678.80, or is the plaintiff limited to the sum of RM160,000 as stated in the consent order less any amounts already paid by the defendants; and
- (iii) regarding the matter of joint and several liability under the consent order and the amount to be paid by each defendant, what is the intention of the parties when they reached a settlement after mediation at the Kuala Lumpur High Court Mediation Centre.

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[26] The defendants have on affidavit averred that they recorded the consent order on the basis that each of the eight defendants pay the plaintiff a sum of RM20,000 only. There was also no admission of liability for such payment. In the fresh writ action, the plaintiff would be required to prove its claim in the manner that it would have been originally required to do so in the suit. It is therefore inappropriate for this court to grant the declaratory reliefs without a proper trial, with witnesses being called to give oral evidence and be subject to cross-examination.

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[27] It is further noted that in prayer four of this OS, the plaintiff made reference to "any sums adjudicated and ordered to be paid". Clearly, the plaintiff is aware that any sum ordered to be paid by the defendants must be adjudicated in a trial, and not be decided in chambers by way of an OS.

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[28] For the reasons stated above, I therefore ordered accordingly.

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